

MC-275
FILED
AUG 26 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
S3
S30

Name gabriel hernandez
 Address KERN VALLEY STATE PRISON
P.O. Box 5163
DELMONICA, CA 93216
 CDC or ID Number F-16381 F-16381

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 (Court)

E-filing

SI

Petitioner	<u>gabriel hernandez</u>
vs.	
Respondent	<u>THE PEOPLE OF THE STATE OF CALIFORNIA</u>

PETITION FOR WRIT OF HABEAS CORPUS

CV 08

4085

(To be supplied by the Clerk of the Court)

(P.D.)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court [as amended effective January 1, 2007]. Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

<input checked="" type="checkbox"/> A conviction	<input type="checkbox"/> Parole
<input checked="" type="checkbox"/> A sentence	<input type="checkbox"/> Credits
<input type="checkbox"/> Jail or prison conditions	<input type="checkbox"/> Prison discipline
<input type="checkbox"/> Other (specify): _____	

1. Your name: Gabriel Hernandez
2. Where are you incarcerated? Kern Valley State Prison, P.O. Box 5703, Delano Ca 93216
3. Why are you in custody? Criminal Conviction Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

ONE COUNT, OF inflicting corporal injury upon mother of child.
ONE COUNT, OF False imprisonment.

- b. Penal or other code sections: 273.5(a), 236-237
- c. Name and location of sentencing or committing court: COUNTY OF SANTA CLARA
SUPERIOR COURT OF CALIFORNIA
- d. Case number: CC 332602
- e. Date convicted or committed: November 15, 2005
- f. Date sentenced: February 1, 2006
- g. Length of sentence: 25 years to life
- h. When do you expect to be released? (A.S.A.P.) AS SOON AS POSSIBLE!

- i. Were you represented by counsel in the trial court? Yes. No. If yes, state the attorney's name and address:

Pantehs Ebshimi, from the office of the Public Defender.
120 West Mission St., San Jose, California 95110

4. What was the LAST plea you entered? (check one)

Not guilty Guilty Nolo Contendere Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

Jury Judge without a jury Submitted on transcript Awaiting trial

NOTE: JURY trial was on current charges.

Allegations of "PRIOR STRIKES" were heard by Judge without a jury.

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

SEE "ATTACHMENT" - A

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

SEE "ATTACHMENT" A

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

SEE "ATTACHMENT-A"

7. Ground 2 or Ground _____ (if applicable):

SEE, "ATTACHMENT - B

a. Supporting facts:

SEE, "ATTACHMENT - B

b. Supporting cases, rules, or other authority:

SEE, "ATTACHMENT - B

8. Did you appeal from the conviction, sentence, or commitment? Yes. No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLANT DISTRICT

b. Result JUDGMENT AFFIRMED

c. Date of decision: FEBRUARY 22, 2007

d. Case number or citation of opinion, if known: HC29867

e. Issues raised: (1) SEE "ATTACHMENTS" (1-4) (4) " " " "

(2) " " " " (5) " " " "

(3) " " " " (6) " " " "

(7) " " " "

f. Were you represented by counsel on appeal? Yes. No. If yes, state the attorney's name and address, if known:

GERALD J. MILLER, P.O. Box 4302, AGOURA HILLS, CA 91376

9. Did you seek review in the California Supreme Court? Yes No. If yes, give the following information:

a. Result PETITION FOR REVIEW IS DENIED b. Date of decision: MAY 23, 2007

c. Case number or citation of opinion, if known: S 191283

d. Issues raised: (1) SEE "ATTACHMENTS" (5-7) (4) " " " "

(2) " " " " (5) " " " "

(3) " " " " (6) " " " "

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

BECAUSE ATTORNEY GERALD MILLER, SAID "A PETITION FOR REVIEW TO THE SUPREME COURT CAN ONLY BE BASED ON MATTERS OCCURRING DURING TRIAL AND REFLECTED IN THE RECORD;" AND MY CLAIMS "DO NOT APPEAR TO BE THE CASE HERE".

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? Yes. No.

Attach documents that show you have exhausted your administrative remedies.

MC-275

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? Yes. If yes, continue with number 13. No. If no, skip to number 15.

13. a. (1) Name of court: SUPERIOR COURT OF CALIFORNIA, STATE OF CALIFORNIA
 (2) Nature of proceeding (for example, "habeas corpus petition"): COMPLAINT
 (3) Issues raised: (a) EIGHTH AMENDMENT PROTECTION FROM PHYSICAL BRUTALITY; MALICE A PRETRIAL DETAINEE.
 (b) RIGHT TO MEDICAL CARE; DELIBERATE INDIFFERENCE.
 (c) RIGHTS OF PRETRIAL DETAINEE.
 (4) Result (Attach order or explain why unavailable): SEE "ATTACHMENTS" 8 - 12
 (5) Date of decision: 4.03.07 AND 4.24.07

b. (1) Name of court: UNITED STATES DISTRICT COURT NORTHERN DIST. OF CALIFORNIA
 (2) Nature of proceeding: COMPLAINT
 (3) Issues raised: (a) PROTECTION FROM PHYSICAL BRUTALITY
 (b) RIGHT TO MEDICAL CARE; DELIBERATE INDIFFERENCE
 (c) RIGHTS OF PRETRIAL DETAINEE
 (4) Result (Attach order or explain why unavailable): SEE "ATTACHMENTS" 13 - 26
 (5) Date of decision: 4.02.07 AND 7.01.08

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

NA

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

PRO-PER INMATE, IS DENIED ADEQUATE ACCESS TO, LAW LIBRARY, RESEARCH MATERIAL, LEGAL MATERIAL, TO PROPERLY PREPARE PETITIONS AND A DEFENSE.

16. Are you presently represented by counsel? Yes. No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? Yes. No. If yes, explain:

A PENDING COMPLAINT IS, "ORDER OF SERVICE", SEE "ATTACHMENTS" - 21 - 26.

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

THE PETITIONER IS NEAR THE (ACDPA) STATUTE OF LIMITATION OF (1) YEAR PLUS (40) DAYS FOR FINALITY. PETITIONER HOPES THE COURTS WILL TOLL THE FEDERAL WRIT OF HABEAS CORPUS WHILE PETITIONER FILES FOR REVIEW ON ADDITIONAL CLAIMS IN STATE COURT.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: AGUST 18, 2008
8.18.2008



(SIGNATURE OF PETITIONER)

"ATTACHMENT - A" (1-3) pg.

ATTACHMENT

SECOND CIVIL
SELECTIVE PROSECUTION

THE PETITIONER WAS CONVICTED AS THE RESULT OF AN UNCONSTITUTIONALLY SELECTIVE PROSECUTION. THIS VIOLATED PETITIONER'S RIGHT TO COUNSEL AND TO DUE PROCESS OF LAW, AS GUARANTEED BY AMENDMENTS 5, AND 14 TO THE U.S. CONSTITUTION. SEE U.S. V. ARMSTRONG, 517 U.S. 456 (1996).

12 DURING THE PRETRIAL STAGES OF DEFENDANTS
13 TRIAL, THE DEFENDANT ~~DISMISSED~~, PETITIONER
14 DISMISSED HIS, THEN "PAID PRIVATE ATTORNEY"
15 PATRICK VALENCIA, FROM HAVING ANY FURTHER
16 DEALINGS WITH DEFENDANT, OR HIS CASE.
17 THE REASON: FOR WHICH PATRICK VALENCIA, WAS
18 DISMISSED FROM FURTHER REPRESENTING PETITIONER
19 AS COUNSEL, WAS DUE TO ATTORNEY PATRICK VALENCIA,
20 "PREJUDICE CONDUCT" TOWARDS THE DEFENDANT, AS
21 WELL AS, ATTORNEY PATRICK VALENCIA, (DOING)
22 THREATENING, PRESSURING, INTIMIDATING, THE
23 DEFENDANT, PETITIONER "IN AN EFFORT TO FORCE
24 DEFENDANT INTO COPING OUT, TO A TWO YEAR
25 PLEAD BARGAIN".... SEE, "AT PG 22 LN 28, PG 23
26 LN 1-25". EXHIBIT 1, &c.

27 Following the dismissal of attorney Patrick
28 Valencia, the Honorable Judge Sharon Ann

1 CHATMAN, FROM THE COUNTY OF SANTA CLARA AND
2 IN DEPT. 46, GAVE AN "ORDER" FOR PUBLIC DEFENDER
3 LOPEZ, OR DAVIS, FROM THE PUBLIC DEFENDERS'
4 OFFICE, TO BEGIN REPRESENTING THE DEFENDANT,
5 PETITIONER DURING HIS TRIAL. SEE, "COURT ORDERS".
6 EXHIBITS-3, 4.5.

7 THE ORIGINAL "ORDER" BY THE HONORABLE JUDGE
8 SHARON ANN CHATMAN, "NEVER OCCURED" AND THE
9 "ORDER" ON RECORD FOR PUBLIC DEFENDER LOPEZ, OR
10 DAVIS, TO BEGIN REPRESENTING THE PETITIONER AT
11 TRIAL, WAS NOT CORRECTED.

12 HOWEVER, A PUBLIC DEFENDER PENTEHUA EBRAHIMI,
13 FROM THE PUBLIC DEFENDERS OFFICE, IN SANTA CLARA
14 COUNTY, WAS MYSTERIOUSLY ALLOWED TO REPRESENT
15 THE (DEFENDANT) PETITIONER. EVEN AFTER DEFENDANT
16 IMMEDIATELY BEGAN EXPERIENCING, "INAPPROPRIATE
17 COUNSEL, DELIBERATE MISREPRESENTATION, AND
18 DELIBERATE INDIFFERENCE, AS WELL AS COERCION.
19 BY COUNSEL PENTEHUA EBRAHIMI, IN THE EFFORT
20 TO CONVINCE DEFENDANT TO COP OUT TO A PLEAD
21 BARGAIN (AS DID DEFENDANT'S PAST ATTORNEY)

22 THE PUBLIC DEFENDER PENTEHUA EBRAHIMI, ALSO
23 CLAIMED TO BE ASSIGNED) TO REPRESENT THE
24 DEFENDANT ON, JULY 16, 2008 AS WELL, AS "CLAIMED",
25 MR. VALENCIA WITHDREW AS COUNSEL. SEE, "AT PG
26 27 IN 17-18, "EXHIBIT-6. BUT THE "CLAIM" BY
27 COUNSEL MS. EBRAHIMI, THAT MR. VALENCIA,
28 WITHDREW AS COUNSEL, DID NOT PREVENT HER FROM

1 RELYING ON MR. VELENCIA, FROM "GUIDING AND
2 FORMULATING A DEFENSE IN THIS CASE". SEE, "RT
3 PG 36 LN 3-5". EXHIBIT - 7

4 IT IS ALSO TRUE THAT DURING AN "MARSDEN
5 HEARING" ON, NOVEMBER 2, 2005, MOTION TO
6 APPOINT NEW COUNSEL BY, THE HONORABLE
7 JUDGE SHARON ANN CHATMAN, STATING "MS.
8 EBRAHIMI, WAS THE PUBLIC DEFENDER WHO WAS
9 ASSIGNED TO YOUR CASE". THEN THE (JUDGE)
10 QUESTIONED HER ORDER, BY SAYING "HOW SHE
11 BELIEVED EBRAHIMI, WAS APPOINTED".
12 BUT NOT BEFORE STATING HOW SHE (JUDGE)
13 "WANTED TO GET A FLAVOR OF WHERE DEFEND-
14 ANT WAS MENTALLY, AS DEFENDANT CAME
15 INTO THE CASE WITH MS. EBRAHIMI". SEE, "RT
16 PG 23 LN 27,28. PG 24 LN 1,7,8,16,17, "EXHIBIT-
17 2,8 .

18 THE HONORABLE JUDGE SHARON ANN CHATMAN,
19 DEPT. 46, AND THE HONORABLE RODNEY J.
20 STAFFORD, DEPT. 36. HEARD MARSDEN MOTION'S
21 AND BOTH JUDGES, SADLY DENIED PETITIONERS
22 PLEA FOR NEW APPOINTED COUNSEL.

23 SEE, MOTION FILED BEFORE (JUDGE) RODNEY J.
24 STAFFORD, ON 11-09-05. EXHIBIT - 9 (A-F) .

25

26

27

28

EXHIBIT

1-2

her the last initial time and I hung up on her. And I'm sorry, but I hung up on her because it was getting out of hand once again, and I just figured there's no point.

THE COURT: Why did you hang up on her?

THE DEFENDANT: Because she was telling me that my witnesses didn't matter, that they -- I'm not going to interview them.

THE COURT: Anything else, Mr. Hernandez?

THE DEFENDANT: She told me I would lose the case, that I should have taken the deal that was offered. She's accused me of being paranoid and accusing everybody out to get me. I just think it's way -- I think she's off track as to what she's doing for me. And I just don't think that she's out to help me or at least find the truth.

THE COURT: Is there anything else?

THE DEFENDANT: No. That's it.

THE COURT: Let me just review what you're trying to share with me is that you've talked a little bit about being frustrated overall in terms of -- in terms of the cases that you had and what appears to you to be pressured by your attorneys who represent you and trying to make you take deals. And you've done that, and it's primarily out of fear because of the fact that if you don't take the deal, then something worse can happen. And you felt the attorneys pressured you into doing that. Would that be accurate?

THE DEFENDANT: Yes.

THE COURT: And you've also felt, and one of the

1 reasons why you fired Mr. Valencia -- and I had you guys
2 for about a year -- and he was trying to pressure you to do
3 the same thing?

4 THE DEFENDANT: Yes.

5 THE COURT: And you have said from the very
6 beginning to Mr. Valencia and to subsequent attorneys that
7 you wanted to tell you're story, you wanted the truth to
8 get out, and Mr. Valencia kept pressuring you to take the
9 two year deal. Would that be accurate also?

10 THE DEFENDANT: Yes. Can I say one more thing
11 right there?

12 THE COURT: Sure. Go ahead.

13 THE DEFENDANT: He wanted more money and he argued
14 me and he threatened me, you're facing three strikes,
15 you're facing 25 years, your life is in my hands, you know,
16 that right. And we were right here in this courtroom. And
17 he pointed at me right here and he scared the living crap
18 out of me. This is when I won't take the two years and
19 before it was a three strikes case, Ms. Chatman.

20 THE COURT: Yes.

21 THE DEFENDANT: He did this and when I couldn't
22 give him no more money and I told him my family had no more
23 money, all of a sudden this turns into three strikes. And
24 here I've been fighting ever since and just constant fear.
25 So, yeah, that's also some of the reason why I fired him.

26 THE COURT: Okay. All right. I just wanted --
27 he's not part of this Marsden, but I wanted to get a flavor
28 of where you were mentally as you came into the case with

EXHIBIT

3-5

3CF14

OPLE VS. JOHNIE HERHARDT
 D.A. ANDREW LARANJAHAN ET
 DGE HUN, SHARON AND CHATHNAH
 PORTER THE GOVERNMENT/DOJ
 F. ATTY. D.A.
 ARGES DOE (PROSECUTED) DEFENDANT KA5

DATE 08/26/2008 DEPT. 100
 CLERK J. VITALE FILED DATE 08/26/2008 BY 100
 HEARING DEFENDANT AGENCY US DEPARTMENT OF JUSTICE
 AGENCY US DEPARTMENT OF JUSTICE STATUS 08/26/2008 10:41:08 TW 100
 APO US DEPARTMENT OF JUSTICE SUPPORT NO SUPPORT
 APO US DEPARTMENT OF JUSTICE SUBJECT NO SUBJECT
 APO US DEPARTMENT OF JUSTICE FILED DATE 08/26/2008

NEXT APPEARANCE

Defendant Present Not Present Atty Present Attala Interpreter Attala AD/PD Legal Aide / Special App
 Arr'd Adv Arr Wav Amend Comp/Info Arr Plea IDC PTC Prob / Sent Interpreter Sworn
 PC977 Filed On File Reprtr. Adv / Wav Bail/ OR/ SORP Rect Dr Rpt FAR/ ERC Bail Apply Balance Exonerated
 NG Entered by CRT NGBRI / Adv PSet Prelim Readiness S / B MTC Bail Exonerated Forfeited Bond # _____
 Denies Priors/ Allegations/ Enhancements/Refusal Further Jury CT Peo / Def Wav Jury Reassumption Filed Forfeiture Set Aside Bail Rein
 TW TNW TW / WD TW Sentence Ref'd Costs Within 30 Days to Court
 Rel/ Appt PD /AD / Legal Aide Conflict Decl APO / Prop 36 P36 Re-Assm't SORP / OR Revoked Reinstated May Post & Forfeit
 Relieved Appt'd Crim Proc Susp Rein BW Ordered \$ Stayed To Issue
 Hrg on Motion Doubt Decl Pursuant PC 1368 No Cite Release/SCIT No Request Cash Only
 Granted Denied Submitted Off Cal Subm on Report Found BW Set Aside Recalled Filed
 Stip to Comm Drs. Appointed Max Term Committed Proof of Attala
 Prelim Wav Certified to General Jurisdiction MDA / COM Amended to Attala
 Amended to (M) VC12500(a) / VC23103(a) Pur VC23103.5 DA Stmt Filed Other: Attala

LEA Conditions: None No State Prison PC17 after 1 Yr Prob Includes VOP Attala Add to Cal

Jail / Prison Term of Attala Subm time of Sent Harvey Stip Attala

Dismissal / Striking Sent Suspended Harvey Stip Attala

Adv Max Pen Parole/Prob Appeal Immig Reg PC290/HS11590/PC457.1/PC186.30 Future Serious Felony PC12021 (110) VC14607.8/PC666

Wav Right to Counsel Court / Jury Trial Subpoena /Confront / Examine Witnesses Self-incrimination Written Waiver filed Plea / Absentia filed

COP GUILTY NOLO CONTENDERE to charges & admits enhancements / allegations / priors PC17 Arbuckle Factual Basis found Findings stated

Prop 36 Granted / Unamenable / Refused / Term DEJ Eligibility Filed DEJ Granted / Rein / Term Fee \$ Guilty Plea Rendered

Waives Referral Ref'd to APO Full Rpt PROBATION DENIED Ref to DOR COURT TODAY

Sentenced to State Prison/County Jail Sent Suspended COUNT \$ PA \$ Purs HS11350d

ROBATION Execution Imposition of sentence suspended for probation period AIDS / CPP \$ PA \$

COURT FORMAL PROBATION GRANTED for Days / Mos / Yrs DPF \$ PA \$

Report to APO within Days Terminated Upon Release LAB \$ PA \$

Perform Hrs Volunteer Work as directed PO / SAP / CAP in lieu of fine DRF / RF \$ Add'l RF \$ Susp'd PC1202.45

Not drive w/o valid DL & Ins Adv VC23600 HTO Delete FOP/MOP AEF \$ Original Fine \$

MOP FOP 12 hrs 3 mos 6 mos Enroll within days SECA \$ CTS PC2900.5 \$

DL Susp/ Restr'd Rvk'd for To, from, during Work/AlcoPrg/Jail/Sch/App NC \$ TOTAL DUE \$

IID Not/Ordered/ Rmv'd Term Yrs DSA thru APO / DOR / CRT Filed ASF / CPF \$ Payments Granted / Modified

No contact with victim or family / co-defts unless appr by APO PC1202.05 AR \$ Mo beginning

DVPO issued / mod /term'd Exp Victim Present SHELTER \$ FINE STAYED

Not own/possess deadly weapons Destroy / Return Weapon DV \$ Committed @ \$ /day May Pay Out

Submit Search/Testing Educ/Voc Trng/Empl No alcohol / drugs or where sold ATTY \$ Consec/Conc to

Substance Abuse, DV, Psych, Parenting, Anger Mgmt, Theft cnsl / prgm \$ Fine / Fees Deemed Satisfied Committed

PC296 (DNA) PC1202.1 HIV Test / Education P/INVEST \$ P/SUP \$ /Mo Waived

OP: Wav Arr'd Admits/Denies Viol Court Finds VOP / No VOP CJAF \$ 207.55

rob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to Restitution \$ to

Original Terms & Conditions Except as Amended herein To be determined by APO/Court Referred to VWAC Collect Civilly

Co-terminous with No Further Penalties / Reviews County Jail

AIL/PRISON See Attachm't Pg for Add'l Orders, Charges, PC1385 Reasons

Count F/M Violation Prison Term / Yrs Enhancement / Priors Yrs / Styd / Strkn HRS / DAYS / MOS

Attala	1/2	1/2								
--------	-----	-----	--	--	--	--	--	--	--	--

Enhancement	Yrs/S	Total								
-------------	-------	-------------	-------	-------------	-------	-------------	-------	-------------	-------	-------

IS = ACT + PC4019 PC2933.1 = TOTAL DAYS TOTAL TERM

Straight time In Camp WWP PC1209 Fees Waived Court Rec All / Except EMP/PSP/WF/ERP/DRP/Co Parole/NP

Sent Deemed Served Rpt to Local Parole Adv of Yrs Parole/Appeal Rights Consec Conc to

Bal CJ Susp All but Hrs/Days/Mos On Cond Complete Residential Treatment Prgm Serve Consec MO/TU/WE/TH/FR/SA/SU

Pre-process AM/PM Stay / Surrender / Transport to @ AM/PM or Sooner

REMANDED-BAIL \$ NO BAIL COMMITTED RELEASED OR SORP DOC TO CONTACT JAC FOR ASSM'T P36

AS COND OF SORP BAIL INCREASED / REDUCED TO PRGM AS REC BY JAC-DOC TO TRANSPORT FOR BALANCE OF JAIL UPON AVAIL BED

ROMISE TO APPEAR: I will appear at all times and places as ordered by the Court, and have read and understand all conditions set forth on the reverse side.

DEFENDANT

40F14

1. BAIL DEF. ATTORNEY
300 W. HELDINGER, STE 100
SAN JOSE, CA 95110
GABRIEL HERMANDEZ
2. BAIL 2 SAN JUAN BAPTIST
SAN JOSE, CA 95110
DGE HON. SHARON ANN CHAPMAN
PORTER S. J. SMITHNER/INTERNS
F. ATTY. PUBLIC DEFENDER D.A.
ARGES F (000) /PC273.5 (A)

DATE 07/16/2008 4:00 PM DEPT. 46
CLERK 12/21/1970 CARMENIST CDY BKR
HEARING 07/16/2008 10:00 AM
AGENCY 12/21/2008 10:00 AM
STATUS T-BET - 2500/00 TW
APO 8/15/2008
SUDO: P614
MIGRATION DATE 07/15/2008
8-6-08 6:30 PM MTC - 46 8/15/2008 8:00 AM D46

PAGE: PC2933/237

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 TW TNW TW / WD TW Sentence Ref'd \$ _____ Costs Within 30 Days to Court
 Ref / Appt PD / AD / Legal Aide Conflict Decl APO / Prop 36 P36 Re-Assm't SORP / OR Revoked Reinstated May Post & Forfeit
 Relieved _____ Appt'd Crim Proc Susp Rein BW Ordered \$ _____ Stayed To Issue
 Hrg on Motion Doubt Decl Pursuant PC 1368 No Cite Release/SCIT No Request Cash Only
 Granted Denied Submitted Off Cal Subm on Report Found BW Set Aside Recalled Filed
 Stip to Comm Drs. Appointed Max Term Committed Proof of _____
 Prelim Wav Certified to General Jurisdiction MDA / COM Amended to _____
 Amended to (M) VC12500(a) / VC23103(a) Pur VC23103.5 DA Stmt Filed Other: _____

PLEA Conditions: None No State Prison PC17 after 1 Yr Prob Includes VOP _____ Add to Cal

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DR Susp/ Restr'd Rvk'd for _____ To, from, during Work/AlcoPrg/Jail/Sch/App IID Not/Ordered/ Rmv'd Term _____ Yrs DSA thru APO / DOR / CRT Filed SECA \$ _____ CTS PC2900.5 \$ _____

No contact with victim or family / co-defts unless appr by APO PC1202.05 NC \$ _____ TOTAL DUE \$ _____

DVPO issued / mod /term'd Exp _____ Victim Present ASF / CPF \$ _____ Payments Granted / Modified

Not own/possess deadly weapons Destroy / Return Weapon AR \$ _____ / Mo beginning _____

Submit Search/Testing Educ/Voc Trng/Empl No alcohol / drugs or where sold SHELTER \$ _____ FINE STAYED _____

Substance Abuse, DV, Psych, Parenting, Anger Mgmt, Theft cnsl / prgm DV \$ _____ Committed @ \$ _____ /day May Pay Out

PC296 (DNA) PC1202.1 HIV Test / Education ATTY \$ _____ Consec/Conc to _____

OP: Wav Arr'd _____ Admits/Denies Viol Court Finds VOP / No VOP P/INVEST \$ _____ P/SUP \$ _____ /Mo Waived

rob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to _____ CJAF \$ _____

Original Terms & Conditions Except as Amended herein Restitution \$ _____ to _____

Co-terminous with _____ No Further Penalties / Reviews To be determined by APO/Court Referred to VWAC Collect Civilly

AIL/PRISON See Attachm't Pg for Add'l Orders, Charges, PC1385 Reasons County Jail

Count F/M Violation Prison Term / Yrs Enhancement / Priors Yrs / Styd / Strkn HRS / DAYS / MOS

Enhancement	Yrs/S	Total								

TS = ACT + PC4019 PC2933.1 = TOTAL DAYS TOTAL TERM _____
 Straight time In Camp WWP PC1209 Fees Waived Court Rec _____ All / Except EMP/PSP/WF/ERP/DRP/Co Parole/NP _____
 Sent Deemed Served Rpt to Local Parole Adv of _____ Yrs Parole/Appeal Rights Consec Conc to _____

Bal CJ Susp All but _____ Hrs/Days/Mos On Cond Complete Residential Treatment Prgm Serve Consec MO/TU/WE/TH/FR/SA/SU _____

Pre-process AM/PM Stay / Surrender / Transport to _____ @ _____ AM/PM or Sooner

REMANDED-BAIL \$ NO BAIL COMMITTED RELEASED OR SORP DOC TO CONTACT JAC FOR ASSMT P36
 AS COND OF SORP BAIL INCREASED / REDUCED TO PRGM AS REC BY JAC-DOC TO TRANSPORT FOR BALANCE OF JAIL UPON AVAIL BED

ROMISE TO APPEAR: I will appear at all times and places as ordered by the Court, and have read and understand all conditions set forth on the reverse side.

DEFENDANT _____ Y _____

5 OF 14
 OPLE VS. GOMEZ, CARLOS
 A. GABRIEL HERNANDEZ
 DGE CATAMARAN ENT
 PORTER SPN JUDGE, CA 85119
 F. ATTY. HON. SUSANNE ANN CHATHAN
 ARGES B. GOMINEK F. W. VEN
 PURPLE DEFENDER D.A. 11-21-2008
 F. GOMINEK F. W. VEN

DATE

07-26-2008

DEPT.

CLERK

12-87193-CAB/OPB/ET

CLN/BRN

HEARING

4/14/08 11:00 AM

COP 1408

AGENCY

FIELD/ ADVANCED RESOLUTION

TW

STATUS

COP 1408-524 -CJ-ELIVAN

APO

100-250000

TW

F. GOMINEK F. W. VEN

SUPO:PE18

INTELLIGENCE DATE

07/15/2008

NEXT APPEARANCE

Defendant Present Not Present Atty Present AD / PD / Legal Aide / Special App
 Arr'd Adv Arr Wav Amend Comp/Info Arr Plea IDC PTC Prob / Sent Interpreter Sworn
 PC977 Filed On File Repr. Adv / Wav Bail/ OR/ SORP Rect Dr Rpt FAR/ERC Bail Apply Balance Exonerated
 NG Entered by CRT NGBRI / Adv PSet Prelim Readiness S / B MTC Bail Exonerated Forfeited Bond # Reassumption Filed Forfeiture Set Aside Bail Rein
 Denies Priors/ Allegations/ Enhancements/Refusal Further Jury CT Peo / Def Wav Jury \$ Costs Within 30 Days to Court
 TW TNW TW / WD TW Sentence Ref'd SORP / OR Revoked Reinstated May Post & Forfeit
 Ref / Appt PD / AD / Legal Aide Conflict Decl APO / Prop 36 P36 Re-Assm't BW Ordered \$ Stayed To Issue
 Relieved Appt'd Crim Proc Susp Rein No Cite Release/SCIT No Request Cash Only
 Hrg on Motion Doubt Decl Pursuant PC 1368 BW Set Aside Recalled Filed
 Granted Denied Submitted Off Cal Subm on Report Found Proof of
 Stip to Comm Drs. Appointed Max Term Committed MDA / COM Amended to
 Prelim Wav Certified to General Jurisdiction Other:
 Amended to (M) VC12500(a) / VC23103(a) Pur VC23103.5 DA Stmt Filed

LEA Conditions: None No State Prison PC17 after 1 Yr Prob Includes VOP Add to Cal

Jail / Prison Term of _____ Subm time of Sent Harvey Stip _____
 Dismissal / Striking _____

Adv Max Pen Parole/Prob Appeal Immig Reg PC290/HS11590/PC457.1/PC186.30 Future Serious Felony PC12021 (11) VC14607.8/PC666

Wav Right to Counsel Court / Jury Trial Subpoena / Confront / Examine Witnesses Self-incrimination Written Waiver filed Plea / Absentia filed

COP GUILTY NOLO CONTENDERE to charges & admits enhancements / allegations / priors PC17 Arbuckle Factual Basis found Findings stated

Prop 36 Granted / Unamenable / Refused / Term DEJ Eligibility Filed DEJ Granted / Rein / Term Fee \$ Guilty Plea Rendered

Waives Referral Ref'd to APO Full Rpt PROBATION DENIED

Sentenced to _____ State Prison/County Jail Sent Suspended _____

PROBATION Execution Imposition of sentence suspended for probation period

COURT FORMAL PROBATION GRANTED for _____ Days / Mos / Yrs

Report to APO within _____ Days Terminated Upon Release

Perform _____ Hrs Volunteer Work as directed PO / SAP / CAP in lieu of fine

Not drive w/o valid DL & Ins Adv VC23600 HTO Delete FOP/MOP DRF /RF \$ Add'l RF \$ Susp'd PC1202.45

MOP FOP 12 hrs 3 mos 6 mos Enroll within _____ days AEF \$ Original Fine \$

DL Susp/ Restr'd / Rvk'd for _____ To, from, during Work/AlcoPrg/Jail/Sch/App SECA \$ CTS PC2900.5 \$

IID Not/Ordered/ Rmv'd Term _____ Yrs DSA thru APO / DOR / CRT Filed NC \$ TOTAL DUE \$

No contact with victim or family / co-defts unless appr by APO PC1202.05 ASF /CPF \$ Payments Granted / Modified

DVPO issued / mod /term'd Exp _____ Victim Present AR \$ \$ / Mo beginning

Not own/possess deadly weapons Destroy / Return Weapon SHELTER \$ FINE STAYED

Submit Search/Testing Educ/Voc Trng/Empl No alcohol / drugs or where sold DV \$ Committed @ \$ /day May Pay Out

Substance Abuse, DV, Psych, Parenting, Anger Mgmt, Theft cnsl / prgm ATTY \$ Consec/Conc to

PC296 (DNA) PC1202.1 HIV Test / Education \$ Fine / Fees Deemed Satisfied Committed

'OP: Wav Arr'd _____ Admits/Denies Viol Court Finds VOP / No VOP P/INVEST \$ P/SUP \$ /Mo Waived

'rob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to _____ CJAF \$ Restitution \$ to _____

Original Terms & Conditions Except as Amended herein To be determined by APO/Court Referred to VWAC Collect Civilly

AIL/PRISON See Attachm't Pg for Add'l Orders, Charges, PC1385 Reasons County Jail

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Bal CJ Susp All but _____ Hrs/Days/Mos On Cond Complete Residential Treatment Prgm Serve Consec MO/TU/WE/TH/FR/SA/SU _____
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 AS COND OF SORP BAIL INCREASED / REDUCED TO PRGM AS REC BY JAC-DOC TO TRANSPORT FOR BALANCE OF JAIL UPON AVAIL BED

ROMISE TO APPEAR: I will appear at all times and places as ordered by the Court, and have read and understand all conditions set forth on the reverse side.

Y _____ DEFENDANT

EXHIBIT

6

1 And I think those were some of my main concerns.

2 THE COURT: So you requested the police report and
3 you requested the preliminary hearing transcript. And at
4 this point in time you have not received them; is that
5 correct?

6 THE DEFENDANT: Yes, I have received none.

7 THE COURT: Anything else?

8 THE DEFENDANT: No.

9 THE COURT: Now as we go through and we finish up
10 the hearing, if there's anything else you can think about,
11 I'm going to ask you again. I want you to make sure that
12 you write it down so that I'll make sure I cover it, okay?

13 THE DEFENDANT: Okay.

14 THE COURT: Ms. Ebrahimi, how long have you
15 represented Mr. Hernandez?

16 THE DEFENDANT: Your Honor, I was first assigned
17 to this case in, I believe, July 18th of 2005. And I was
18 assigned to this case after Mr. Valencia withdrew as
19 counsel.

20 THE COURT: Could you briefly state what you have
21 done on behalf of Mr. Hernandez. For example, taking the
22 police reports, request investigation, confer to client,
23 request legal research, interview witnesses, prepare
24 motions.

25 MS. EBRAHIMI: Yes, your Honor.

26 Your Honor, as I indicated to the Court, I have
27 been assigned -- I was assigned in this case in July of
28 2005. Immediately after I was assigned the case because

EXHIBIT

7

1 I've retained an expert after talking to numerous other
2 doctors, and that expert is prepared to testify, as well as
3 trying to formulate a defense. And I've talked to
4 Mr. Valencia several times again and he's been very helpful
5 in guiding me and formulating a defense in this case.

6 THE COURT: Thank you, Ms. Ebrahimi.

7 MS. EBRAHIMI: Thank you.

8 THE COURT: Mr. Hernandez, anything further from
9 you, sir?

10 THE DEFENDANT: This is, first of all, the most
11 I've heard about my case. Second, she's lied majorly like
12 three or four times. She never ever talked to me
13 yesterday.

14 First of all, the last time I spoke to her on the
15 phone was, I think, a week ago. And another thing she told
16 me the last time we spoke on the phone, I -- now remember
17 why we hung up. She told me that she had ten other cases
18 this month and that she didn't have time to come down and
19 see me. So, I mean, I don't know where -- I have no clue.
20 I mean, a lot of what she said -- a lot of it is not true.
21 And it's just not true. And she never told me it was up to
22 me what I wanted to do. She never even told me about the
23 defense tactics she talked about. I never even heard that
24 come out of her mouth before until now.

25 So I've kind of been lost completely until I
26 actually feel like I know a lot more about my case just
27 hearing her. And I don't mean to say that in a bad way
28 she's lying, but that's the truth. She has completely just

EXHIBIT

#8

1 Ms. Ebrahimi, okay?

2 THE DEFENDANT: Okay.

3 THE COURT: And so at some point, Mr. Valencia was
4 fired and then I appointed the public defender to represent
5 you?

6 THE DEFENDANT: Yes.

7 THE COURT: And Ms. Ebrahimi was the public
8 defender who was assigned to your case. Since that time,
9 you have indicated that she has seen you, is it two times
10 or more than two times?

11 THE DEFENDANT: Ms. Panteha?

12 THE COURT: Yes.

13 THE DEFENDANT: She has seen me, I think, three
14 times. Yeah, it's been three times. She came out to the
15 County Jail three times to see me.

16 THE COURT: So she's seen you three times and I
17 believe she was appointed -- anyway, the three times that
18 she interviewed you, you've indicated that most of the
19 conversation had been focused on her advising you, number
20 one, of what the offer was and then her giving you advice
21 about whether or not she felt that you should take that
22 offer. Would that be accurate about what you told me this
23 morning?

24 THE DEFENDANT: I didn't understand that. Say
25 that again.

26 THE COURT: Basically you said that the first
27 interview was 15 minutes, and she indicated that based upon
28 her observation in reading the case that it didn't look

EXHIBIT

9 (A-F)

9/05/04

'A'

EXhibit
\$

MOTION FOR ~~DISMISSAL~~
OF ATTORNEY & COUNSEL
NOV 7, 2005
page (1) ONE

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara

BY Deputy DEPUTY

(1) I Gabriel Hernandez,
Dated Nov, 7th, 2005, IN
Santa Clara County, In the
Superior Court, hereby beg
and motion the court to
dismiss my present & current
attorney and Counsel, From
any further representation
in any legal matters
pertaining to me as of
this day 7th, month November,
year 2005, in the interest
of my Constitutional right,
due process, and of
Justice, on the grounds
of:

(1) Selective prosecution:
It is my knowledge & belief
threw my attorneys hostile
attitude & behavior to me
on a continuous basis, AS
Well as her corrupt actions
by assisting the Judge
and district attorney in
selectively prosecuting me,
(Continued Next Page) ¹³⁶

10 of 14

"B"

MOTION FOR DISMISSAL
OF ATTORNEY & COUNSEL

Page TWO (2) 11-7-05

(continued) Which amounts to Selective prosecution, and violation of my Due process rights, and of my Constitutional rights.

(3) INappropriate Counsel- my attorney has deliberately for the benefit of the district attorney and for the Judge neglected and purposely refused to contact and to interview witnesses on my behalf which are vital and most important to proving my Innocance in the court of Law, This amounts to INNopriate counsel- and violates all my legal rights to a Fair Trial and to receive appropriate counsel to protect my rights, which also violates my due process & constitutional rights.

137

(Continued on third page)

11/07/14

"C"

MOTION FOR DISMISSAL OF
ATTORNEY & COUNSEL

11-7-05

Page (3) Three

(3) Deliberate Misrepresentation:
my attorney, is using his
position to deliberately
misrepresent me, by
refusing to file or to
request a motion for
me to be evaluated by
the psychiatrist under
"incompetent to stand trial."
my attorney's deliberate
"misrepresentation" is done
due to personal feelings
regarding my attorney's
dislike for domestic
violence, as well as my
attorney's hostile feelings
and attitude towards me,
as well as my attorney's
efforts & cooperations with
the district attorney's office
and the Judge to persecute
and prosecute me.

Which amounts to deliberate
misrepresentation and is ^{if 38}
(Continued page Four)

12 OF 14

"①"

MOTION FOR DISMISSAL OF
ATTORNEY & Counsel.

11-7-05

Page (4) Four

(continued) direct violation of my Federal and Constitutional rights.

(4) Deliberate INdifferencE: my attorney, has conteneduly exhibited hostile and prejudice attitude and feelings Towards me because of the allegations of domestic violence, and because of my attorney's conspiring with the district attorney and with the Judge to Selectively prosecute me... my attorney has expressed verbally and in action that She will not represent me to the best of her ability due to the fact that She has hostile and negative feeling to me and due to the fact that She IS in a conspiracy to persecute & (Continued page Five) 139

13 OF 14

"E"

MOTION FOR DISMISSAL OF
ATTOKNEY & Counsel

11-7-05

Page (5) Five

(Continued) prosecute me for the interest and for the benefit of the district attorney and for the judges benefits.

THIS IS in direct violation of my CIVIL and Federal right as well as my Constitutional rights.

For the above and written motion I request that my attorney not be allowed to represent me in any legal matter pertaining to me under the Constitution of the United State which is guaranteed to me in the court of law so that I can have and receive a fair & impartial hearing & trial.

I declare that this motion to be true & correct.

(Continued Page (6) Six)

140

140814

"F"

MOTION FOR DISMISSAL OF
ATTORNEY & COUNSEL

11-7-05

Page (6) SIX

Signed Gabriel Hernandez
Gabriel Hernandez

11-07-005
Dated

"ATTACHMENT - B (1-2) pg.

(KOMERO) TWO
BLAKELY VIOLATION

1 PETITIONER'S SENTENCE WAS INCREASED
 2 IN BASIS OF FACTS FOUND BY THE JUDGE
 3 RATHER THAN BY THE JURY. THIS VIOLATED
 4 PETITIONER'S RIGHT TO JURY TRIAL, AND TO DUE
 5 PROCESS OF LAW, AS GUARANTEED BY AMENDMENTS
 6 6, AND 14 TO THE U.S. CONSTITUTION. SEE
 7 *BLAKELY V. WASH.*, 543 U.S. 296 (2004).

8 THE DEFENDANT, PETITIONER'S (COUNSEL) AND
 9 PUBLIC DEFENDER PINTCHA EBRAHIMI, CAUSED
 10 THE PETITIONER TO WAIVE HIS RIGHTS, TO A JURY
 11 TRIAL ON (ALLEGED) "PRIOR STRIKES" OF 1990, DURING
 12 A BIFURCATED PROCEEDING. SEE, EXHIBIT - O
 13 THEN MS. EBRAHIMI, THE DEFENDANT'S (COUNSEL)
 14 MISREPRESENTED THE DEFENDANT, PETITIONER
 15 BY SUBMITTING FALSE ACCOUNTS, (ALLEGEDLY)
 16 COMMITTED BY DEFENDANT IN THE 1990, (TWO)
 17 ALLEGED "PRIOR STRIKES" IN COUNSEL'S (ROMERO
 18 MOTION) "STATEMENT IN MITIGATION" PAPERS, (REPORT).
 19 SEE, EXHIBIT - 1(A-B).

20 ALSO THE DISTRICT ATTORNEY, TIMOTHY MOORE,
 21 FOR SANTA CLARA COUNTY, SUBMITTED FALSIFIED
 22 "MOVING PAPERS", THE "PEOPLES OPPOSITION TO
 23 DEFENDANT'S ROMERO MOTION PERSUANT TO
 24 PC § 1385. SEE, EXHIBIT - 2(A-C).

1 THE EVIDENCE USED DURING THE BIFURCATED
2 COURT TRIAL ON THE PRIOR CONVICTION ALLEGAT-
3 TIONS WAS INSUFFICIENT TO SUPPORT THE TRIAL
4 COURTS FINDINGS THAT APPELLANT HAD SUFFERED
5 VARIOUS "STRIKES".

6 THE TRIAL JUDGE CLAIMED TO "HAVE ITS FACTS
7 IN THE MOVING PAPERS, WHERE TWO INDIVID-
8 UALS WERE STABBED OR POKED WITH A KNIFE".
9 THE TRIAL JUDGE, HONORABLE RODNEY J. STAFFORD,
10 WENT ON TO "CLAIM", HOW "ONE PERSON WAS
11 INJURED SLIGHTLY THE OTHER WAS INJURED MORE
12 SERIOUSLY". SEE, "RT PG 492 IN 26-28". EXHIBIT-3.

13 THE DISTRICT ATTORNEY TIMOTHY MOORE, FOR THE
14 PEOPLE OF CALIFORNIA, STATED "HOW HE WAS
15 UNABLE TO DETERMINE WHAT HAPPEND TO THE
16 SECOND STRIKE". SEE, "RT PG 489 IN 14-22". EXHIBIT-4.

17 BUT YET STILL, EVEN WITHOUT THE ALLEGED SECOND
18 "STRIKE", THE DISTRICT ATTORNEY, PUBLIC DEFEND-
19 ER, AND JUDGE, HAVE ALL STATED IN GREAT
20 DETAIL THROUGH MOVING PAPERS (DOCUMENTS),
21 REPORTS HOW FACTUAL EVIDENCE SUPPORTS THEIR
22 DESCRIPTIONS OF ALLEGED STRIKES.

23 SEE, "DOCUMENT", EXHIBIT-5.

24

25

26

27

28

EXHIBIT

~~40~~

1 OF 9
1 SAN JOSE, CALIFORNIA

NOVEMBER 15, 2005

2 PROCEEDINGS3 THE COURT: ALL RIGHT. ON THE GABRIEL
4 HERNANDEZ MATTER. RECORD SHOULD SHOW THAT BOTH COUNSEL
5 ARE PRESENT AND MR. HERNANDEZ IS PRESENT.6 ~~I DISCUSSED WITH COUNSEL WHETHER THERE WAS GOING TO~~
7 ~~BE A JURY WAIVER WITH REGARD TO THE PRIOR CONVICTIONS.~~
8 ~~AND IT'S MY UNDERSTANDING THAT AT THIS TIME, MISS~~
9 ~~EBRAHIMI, MR. HERNANDEZ IS WILLING TO WAIVE HIS RIGHT TO~~
10 ~~A JURY TRIAL ON THE PRIORS.~~11 ~~MS. EBRAHIMI, YES, YOUR HONOR. HOWEVER, HE~~
12 ~~DOES WANT TO EXERCISE HIS RIGHT TO A COURT TRIAL ON THOSE~~
13 ~~PRIORS.~~14 ~~THE COURT. THAT'S FINE. THAT'S FINE.~~15 MR. HERNANDEZ, THERE ARE CERTAIN PRIORS THAT ARE
16 ALLEGED IN THE INFORMATION. DO YOU UNDERSTAND THAT YOU
17 DO HAVE THE RIGHT TO HAVE A JURY DETERMINE WHETHER YOU
18 HAVE SUFFERED THOSE PRIOR CONVICTIONS OR NOT?

19 THE DEFENDANT: YES, I DO.

20 THE COURT: OKAY. AND IF YOU WAIVE YOUR RIGHT
21 TO A JURY TRIAL ON THAT ISSUE, ~~JUST ON THE PRIOR~~
22 ~~CONVICTION OF COURSE, NOT -- IT DOESN'T HAVE ANYTHING TO~~ *It Has*
23 ~~DO WITH THE UNDERLYING CHARGE, BUT IF YOU WAIVE YOUR~~ *Everything to*
24 ~~RIGHT TO A JURY TRIAL ON THE PRIOR CONVICTION, AND HAVE A~~ *do with*
25 ~~COURT TRIAL, THAT MEANS THAT I WILL BE THE PERSON THAT~~ *The Underlying*
26 ~~MAKES THE DETERMINATION OF WHETHER OR NOT YOU HAVE~~ *Charge.*
27 ~~SUFFERED THOSE PRIOR CONVICTIONS. DO YOU UNDERSTAND~~28 THAT? *UNDER "CUNNINGHAM v. CAL. I HAVE THE RIGHT TO A*
JURY TRIAL TO DETERMINE WHETHER I, SUFFERED PRIORS, OR NOT.

EXHIBIT

#1(A,B)

Falsified Documents
By P.D.

D 36
1 LAW OFFICES OF THE PUBLIC DEFENDER
2 MARY GREENWOOD, # 99728
3 PANTEHA EBRAHIMI, #200968
4 County of Santa Clara
5 120 West Mission Street
6 San Jose, CA 95110
7 Telephone: 299-7180
8 Attorneys for Defendant

FILED

DEC 02 2005

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
By Debra Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

10 PEOPLE OF THE STATE OF CALIFORNIA, NO: CC332602
11 Plaintiff, STATEMENT IN MITIGATION
12 vs.
13 GABRIEL HERNANDEZ, Date: December 16, 2005
14 Defendant Time: 9:00 a.m.
Dept: 36 Time Estimate: 15 minutes

16 TO THE CLERK OF THE ABOVE ENTITLED COURT, AND
17 TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SANTA CLARA:

18 NOTICE IS HEREBY GIVEN that on the 16th day of December of 2005, at
19 9:00 am., in Department 36 of the above-entitled court, the above named defendant will
20 move the court to dismiss his strike alleged pursuant to Penal Code Section 1385.

21
22 Dated: December 2, 2005

23 Respectfully submitted,
24
25 MARY GREENWOOD
26 Public Defender
27
28 PANTEHA EBRAHIMI
Deputy Public Defender

Panteha Ebrahimi
PANTEHA EBRAHIMI
Deputy Public Defender

30F9

1 ultimate sentence in light of other individualized considerations, including the interests of
2 Gabriel Hernandez and society as a whole.

3

4 **STRIKE PRIOR**

5 Approximately, 15 years ago, during the evening of June 24, 1990 defendant Gabriel
6 Hernandez entered a 7-Eleven convenience store where he attempted to purchase beer.
7 Once, Gabriel selected his purchase, Mr. Nestor advised him to place his selection on the
8 counter. Mr. Nestor and Gabriel proceeded with the transaction by calculating the total of
9 the merchandise. Mr. Nestor informed Gabriel the total was \$23.00. The amount exceeded
10 the amount of cash Gabriel had therefore he became angry. Gabriel and Mr. Nestor began to
11 argue, which subsequently caused Gabriel to leave the store. ~~At approximately 2:54 p.m.,~~
12 ~~Gabriel returned to the store. While he was attempting to pull into the store, Mr. Nestor~~
13 ~~shoved a breakable item at Gabriel nevertheless entered the store. Mr. Nestor then backed~~
14 ~~Gabriel into a corner near the register and hit Gabriel with a candy bar. Gabriel then took~~
15 ~~out his knife and "poked" Mr. Nestor in the leg. Gabriel then attempted to leave but the~~
16 ~~second store clerk approached him. The other store clerk, Mr. Yap tried to block Gabriel~~
17 ~~from leaving the store. This caused Gabriel to hit Mr. Yap in the leg with his knife. Gabriel~~
18 ~~then left the store on a motorcycle with a friend. Later, Gabriel returned to store to follow up~~
19 ~~on the incident when the police approached him. Gabriel attempted to flee through Kelly~~
20 Park but was arrested shortly after. Gabriel's blood alcohol level was 0.21% at the time of
21 his arrest. Both individuals obtained medical treatment, but had no permanent injury as a
22 result of the incident. Gabriel was subsequently charged and convicted (by a plea of guilty)
23 of two counts of assault with a deadly weapon. Gabriel received two years in state prison
24 for this conviction.

25 **CURRENT OFFENSE**

26

27

28

260

*COMPLETELY
"FALSE"*

EXHIBIT

#2 (A-C)

1 GEORGE W. KENNEDY, DISTRICT ATTORNEY
2 State Bar No. 052527
3 TIMOTHY S. MOORE, DEPUTY DISTRICT ATTORNEY
4 State Bar No. 193584
5 COUNTY GOVERNMENT CENTER, WEST WING
70 West Hedding Street
San Jose, CA 95110
Telephone: (408) 299-7400

FILED

JAN 30 2006

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
By S. Chua Deputy

Attorneys for The People

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

10 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO.: CC332602
11 Plaintiff,)
12)
13 vs.) PEOPLE'S OPPOSITION TO
14 GABRIEL HERNANDEZ,) DEFENDANT'S ROMERO MOTION
15) PURSUANT TO PC §1385
16)
17 Defendant(s).) Date: February 1, 2006
18) Time: 9:00 a.m.
19) Dept: 27
20)
21)

I. INTRODUCTION

On November 15, 2005, the defendant, Gabriel Hernandez, was convicted by jury of a felony violation of Penal Code §273.5(a) and a felony violation of Penal Code §236-237. The jury found the special allegation that the defendant personally inflicted great bodily injury as defined by Penal Code §12022.7(e) untrue. At a court trial on the defendant's prior convictions, the trial court found true that the defendant has suffered two convictions within the meaning of Penal Code §667 (b)-(i)/1170.12, and three prison priors within the

People's opposition to defendant's romero motion pursuant to PC §1385

George W. Kennedy
District Attorney
County of Santa Clara
San Jose, California 95110

274

1	4/90	P.C. §647(f) – Public Intoxication P.C. §148(a)(1) – Resisting/delaying arrest	10 days jail
2	7/90	P.C. §245 (a)(1) – Assault w/a deadly weapon P.C. §245 (a)(1) – Assault w/a deadly weapon	2 yrs CDC
3	10/92	V.C. §23152(b) – Driving under the influence	jail
4	4/93	V.C. §20001(b)(1) – Felony hit and run	1 year jail
5	9/93	Violation of Parole	
6	1/94	V.C. §2800.2 – Felony evading a police officer	— 16 months CDC
7	2/95	V.C. §12021(a)(1) – Felon in possession of a firearm	— 32 months CDC
8	6/97	V.C. §23152(a) – Driving under the influence	— 90 days
9	9/97	Violation of Parole	
10	9/99	Violation of Parole	
11	1/00	Violation of Parole	
12	4/01	Violation of Parole	
13	7/02	P.C. §242-243(e) – Battery in a dating relationship	25 days
14	9/03	Charged offenses	
15	6/05	<i>Arrest while out on bail for current offense</i> Penal Code §12021(a)(4)	Pending

20 DEFENDANT'S PRIOR STRIKE CONVICTIONS

21 The defendant was convicted in 1990 after having stayed down at the clerks. The
22 defendant had been in the store previously and had an argument with the clerks. The
23 defendant became angry, pushed the clerk and left the store. The defendant returned
24 the store with a knife, and during a physical altercation with one of the clerks, he
25 ~~the defendant~~

*This is a complete
lie. This never
happened*

This never haffend, This is
a complete lie. [REDACTED]
[REDACTED] [REDACTED]



1 [REDACTED] the clerk in the leg without a knife. The defendant then stabbed the second clerk with the
2 [REDACTED] same knife when the second clerk came to his co-worker's aid. The victims described the
3 [REDACTED] defendant laughing as he committed these crimes. As of the time of the probation report (two
4 [REDACTED] months later) the clerk who was stabbed in the leg was still experiencing difficulty walking
5 [REDACTED] due to his injuries. The clerk who was stabbed in the arm received cut two stitches to close the
6 [REDACTED] wound and had difficulty using his arm.
7 [REDACTED]

8 **DEFENDANT'S 1995 CONVICTION FOR PC 12021 INVOLVED A THREAT TO
KILL**

9 The defendant's 1995 conviction appears to be a simple Penal Code §12021 on its
10 face. A review of the facts demonstrates the contrary, however. In that case the defendant's
11 possession of a firearm came to the attention of the police after he showed the weapon to
12 another male after exchanging stares. While showing the 9mm semi-automatic Smith and
13 Wesson to the victim, the defendant placed his hand on the handle of the gun that was in his
14 waist ban of his pants the defendant asked the victim if he wanted the defendant "to cap his
15 ass".
16

17 **DEFENDANT'S 2002 DOMESTIC VIOLENCE CONVICTION**

18 The defendant was convicted of battering Angelica Valdez on June 30, 2002. Ms.
19 Valdez and the defendant had a prior relationship that lasted one year ending in
20 approximately 1999. They had resumed their relationship in 2002. On the incident date the
21 defendant became jealous of the Ms. Valdez's relationship with another male. The
22 defendant began to insult Ms. Valdez while she drove the couple home. Once the car
23 stopped, the defendant slapped the victim two times in the face and told her to get out of her
24 car.
25

26

George W. Kennedy
District Attorney
County of Santa Clara
San Jose, California 95110

5441 REV 1/91

People's opposition to defendant's romero motion pursuant to PC §1385

278

EXHIBIT

~~#~~ 3

1 '99. 2000 AND 2001. IT'S SIMPLY ONE RIGHT AFTER
2 ANOTHER. AND QUITE FRANKLY IN GOOD CONSCIENCE I CAN'T
3 SEE WHERE BASED UPON THE CIRCUMSTANCES OF THIS OFFENSE,
4 BASED UPON THE RECORD THAT MR. HERNANDEZ HAS BUILT FOR
5 HIMSELF, AND ITS NOT JUST THIS CASE, WE WOULDN'T BE HERE
6 TODAY IF THE ONLY CONVICTION WAS FOR WHAT OCCURRED ON
7 DATE OF OFFENSE. WE ARE HERE BECAUSE OF THINGS THAT
8 HAPPENED MUCH EARLIER THAN THAT. THE DEFENDANT'S RECORD.
9 AND BASED UPON THAT RECORD AND THE CIRCUMSTANCES OF THE
10 OFFENSE, I DON'T BELIEVE THAT MR. HERNANDEZ DOES FALL
11 OUTSIDE THE SPIRIT OF THE THREE STRIKES THAT WOULD ENABLE
12 ME TO BASICALLY STRIKE ONE OR TWO OF THOSE STRIKES. SO,
13 I'M NOT GOING TO DO THAT. I'LL DENY THE MOTION TO STRIKE
14 THE PRIOR OR BOTH PRIORS. MR. HERNANDEZ, YOU HAD A
15 QUESTION?

16 THE DEFENDANT: CAN I SAY SOMETHING?

17 THE COURT: SURE.

18 THE DEFENDANT: HE MENTIONED THE 245 IN 1990.
19 I UNDERSTAND OR I BELIEVE ONE INDIVIDUAL GOT HURT, YOUR
20 HONOR. THEY ARE SAYING TWO PEOPLE. ONE PERSON GOT HURT.
21 AND I JUST WANT TO NOTE THAT BECAUSE IT WAS NOT TWO LIKE
22 THE DISTRICT ATTORNEY IS SAYING. IT WAS ONE. IF YOU
23 GUYS LOOK INTO THE RECORDS IT WAS ONE PERSON THAT WAS
24 INVOLVED IN THAT INCIDENT.

25 THE COURT: ALL RIGHT. THE COMMENT IS NOTED.
26 THAT'S NOT HOW I READ THE REPORTS, MR. HERNANDEZ. MY
27 READING OF THE REPORTS IS THAT ONE PERSON WAS INJURED
28 SLIGHTLY THE OTHER WAS INJURED MORE SERIOUSLY. SO, ALL

EXHIBIT

#4

1 "DIFFERENT TIMES." AND FACTS ARE CLEAR, AND I ACTUALLY
2 JOIN WITH THE COURT THAT THE COURT CAN IN FACT CONSIDER
3 CIRCUMSTANCES INVOLVING AN INCIDENT FOR PURPOSES OF A
4 ROMERO MOTION. THE COURT CAN CONCIDER POLICE REPORTS
5 THAT ARE HEARSAY AND THINGS THAT WERE NOT PLED AND PROVEN
6 IN A PARTICULAR OFFENSE. OBVIOUSLY THAT RELATES TO THE
7 12021 CONVICTION FROM 1990, CONVICTION FROM 1995.

8 AND FURTHER AS TO BLAKELY, BLAKELY HAS BEEN FOUND
9 NOT TO APPLY IN THE STATE OF CALIFORNIA. IT HAS NO
10 RELEVANCE HERE. THE 32 MONTH SENTENCE THAT MR. HERNANDEZ
11 RECEIVED IN 1995 WAS IN FACT AS WE NOW CAN VIEW IN
12 HINDSIGHT, TREMENDOUS BENEFIT TO MR. HERNANDEZ.
13 MR. HERNANDEZ WAS A THREE STRIKER IN 1995 AT THE TIME HE
14 COMMITTED THAT 12021. IT INVOLVED A FIREARM. ■■■■■

15 ~~PERSONALLY IN MY RESEARCH IN PREPARING FOR THIS ROMERO~~
16 ~~MOTION, I WAS UNABLE TO DETERMINE WHAT HAPPENED TO THE~~
17 ~~SECOND STRIKE, AND APPEARS THAT MR. HERNANDEZ RECEIVED~~
18 ~~THE BENEFIT OF A TWO STRIKE SENTENCE IN 1995. WHETHER~~
19 ~~THAT WAS AT THE BENEVOLENCE OF THE PEOPLE STRIKING A~~
20 ~~STRIKE, OR IN ALLEGING ONE STRIKE, OR THE COURT STEPPING~~
21 ~~IN, AND STRIKING A STRIKE, I'M UNABLE TO DETERMINE AT THIS~~
22 ~~TIME, BUT CLEARLY THE CONVICTIONS WERE THEREAS OF 1995.~~
23 AND MR. HERNANDEZ'S HISTORY DESPITE THE BENEFIT WAS VERY
24 POOR.

25 MOVING FORWARD TO 1995. MANY VIOLATIONS OF PAROLE.
26 HE TURNED A 32 MONTH SENTENCE INTO A MAXED OUT PAROLE
27 VIOLATION. AND I BELIEVE SINCERELY MR. HERNANDEZ'S
28 STATEMENTS WHEN HE SAYS THEY WERE PRIMARILY BEING UNDER

*Because a second strike
never existed no does it.*

EXHIBIT

~~# 5~~

**County of Santa Clara
Superior Court of California**

191 North First Street
San Jose, California 95113
(408) 882-2700

HALL OF JUSTICE



Re: HERNANDEZ, GABRIEL
Case#: C9084574

D.O.B.: CDC#: F-16381

There was not enough information
 Not a full name, alias, or D.O.B. to match.
 The case number that was given was incomplete or incorrect

Our records do not reflect any complaint(s) filed for the year(s) _____ to _____ within the County of Santa Clara.

The files requested are located at another Court Facility, your request and check has been forwarded:

The file was purged due to applicable time statutes.

Other:

Payment was not included or is insufficient:
GC 70627(a) Copies \$ 0.50 per page(single sided) (two sided=2 pages)
GC 70626(a)(4) Certifications \$15.00 per certification per document
GC 70627(c) Any search for records or files which takes longer than 10 minutes \$15.00

Fees due for this Request:

____ X copies @ \$ 0.50 per page = \$ _____
____ X certification @ \$15.00 each = \$ _____
____ Excess time Fee@ \$15.00= \$ _____
TOTAL AMOUNT DUE = \$ _____
AMOUNT SUBMITTED: \$ _____
BALANCE DUE: \$ _____

DATE: 04/15/08

By:

Andriana R. Roman-Castillo, LPCIII

HOJ PUBLIC SERVICE DIVISION

"ATTACHMENTS" (1-4) PGS:

1 IT IS THEREFORE REQUESTED THAT THE COURT REVERSE APPELLANTS
2 CONVICTIONS, BECAUSE THE TRIAL COURTS INSTRUCT-
3 ion of the JURY MISSTATED THE LAW WITH
4 RESPECT TO THE EXTENT OF THE FORCE THAT
5 APPELLANT WAS ENTITLED TO USE TO EJECT
6 NICHOLS FROM THE PROPERTY....

ACCORDING TO THE TRIAL COURT'S INSTRUCTION,

A DEFENDANT'S RIGHT TO EJECT A TRESPASSER
IS NOT NECESSARILY LIMITED TO THAT NECESS-
ARY TO THE FORCE NECESSARY TO PREVENT
PROPERTY DAMAGE OR PHYSICAL INJURY ~~etc.~~

B. THE TRIAL COURT'S MISSTATEMENT OF THE LAW
AND MISINSTRUCTION OF THE JURY MATERIALLY
PREJUDICED APPELLANT, AND REQUIRES
REVERSAL OF APPELLANT'S CONVICTION.

1. THE TRIAL COURT'S MISINSTRUCTION AMOUNTED TO FAILURE TO INSTRUCT ON THE ISSUE OF DEFENSE OF PROPERTY, WHICH IS REVERSABLE PER SE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

2. THE TRIAL COURTS' IMPROPER INSTRUCTION OF
THE JURY CANNOT BE CONSIDERED HARMLESS
ERROR, EVEN UNDER THE LESSER, CHAPMAN
STANDARD

II. THIS COURT SHOULD REVERSE APPELLANT'S CONVICTIONS, BECAUSE THE TRIAL COURT ALSO

1 MISINSTRUCTED THE JURY THAT APPELLANT'S RIGHT
2 TO DEFEND THE PROPERTY WAS LIMITED BY
3 NICHOLS'S INTENT IN ENTERING THE PROPERTY,
4 AND THEREBY VIOLATED APPELLANT'S RIGHT UNDER
5 THE FIFTH AND FOURTEENTH AMENDMENTS TO THE
6 UNITED STATES CONSTITUTION

7
8 III. TO THE EXTENT THAT THE TRIAL COURT
9 LACKED THE DUTY TO INSTRUCT THE JURY SUM
10 SPONTE AS TO APPELLANT'S RIGHT TO DEFEND THE
11 PROPERTY, THE FAILURE TO REQUEST SUCH AN
12 INSTRUCTION CONSTITUTES INEFFECTIVE ASSIST-
13 ANCE OF COUNSEL, AND VIOLATED APPELLANT'S RIGHT
14 UNDER THE SIXTH AND FOURTEENTH AMENDMENTS
15 TO THE UNITED STATES CONSTITUTION

16
17 IV. THIS COURT SHOULD REVERSE APPELLANT'S CONVICTIONS,
18 BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE
19 JURY REGARDING THE UNAVAILABILITY OF SELF
20 DEFENSE FOR A PERSON THAT INITIATES A QUARREL,
21 BECAUSE IT WAS NICHOLS, RATHER THAN APPELLANT,
22 THAT INITIATED THE QUARREL, AND BECAUSE THE
23 INSTRUCTION WAS, THEREFORE, UNSUPPORTED BY
24 THE EVIDENCE AND VIOLATED APPELLANT'S DUE
25 PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH
26 AMENDMENTS

27
28 V. THIS COURT SHOULD REVERSE APPELLANT'S CONVICTION,

1 IMPROPERLY ADMITTED EVIDENCE OF APPELLANT'S
2 PRIOR MISDEMEANOR BATTERY CONVICTION BASED
3 MERELY ON THE FACT OF APPELLANT'S CONVICTION,
4 WITHOUT CONSIDERING THE UNDERLYING FACTS
5 AND THEIR SIMILARITY OR DISSIMILARITY TO
6 THE PRESENT ALLEGED OFFENSE, AND THEREBY
7 VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER
8 THE FIFTH AND FOURTEENTH AMENDMENTS.

9 A. BY REQUIRING A WEIGHING OF THE PROBATIVE
10 VALUE OF EVIDENCE REGARDING DOMESTIC VIOLENCE
11 AGAINST ITS PREJUDICIAL EFFECTS, THE STATUE AND
12 DUE PROCESS REQUIRES A SHOWING OF THE FACTS
13 SURROUNDING THE PRIOR CONVICTION, AND NOT
14 MERELY THE FACT OF SUCH CONVICTION.

15 B. THE TRIAL COURT'S ADMISSION OF THE MERE FACT
16 OF APPELLANT'S PRIOR CONVICTION, UNACCOMP-
17 ANIED BY ANY ANALYSIS OF THE FACTS
18 SURROUNDING THAT CONVICTION, VIOLATED
19 SECTION 1108 AS WELL AS APPELLANT'S FEDERAL
20 RIGHT TO DUE PROCESS UNDER THE FIFTH AND
21 FOURTEENTH AMENDMENTS, AND REQUIRES
22 REVERSAL OF APPELLANT'S CONVICTION.

23
24 VI. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S
25 ERRORS REQUIRES REVERSAL OF APPELLANT'S
26 CONVICTION.

27
28 VII. THE TRUE FINDINGS ON THE STRIKES PRIORS

1 MUST BE REVERSED UNDER THE DUE PROCESS CLAUSE
2 OF THE FIFTH AND FOURTEENTH AMENDMENTS,
3 BECAUSE THE FINDINGS ARE NOT SUPPORTED BY
4 SUBSTANTIAL EVIDENCE . . .

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"ATTACHMENTS" (5-7) PG'S.

1 I. THIS COURT SHOULD GRANT REVIEW AND REVERSE
2 PETITIONER'S CONVICTION, BECAUSE THE TRIAL COURT
3 MISSTATED THE LAW WITH RESPECT TO THE EXTENT OF
4 THE FORCE THAT A HOME OWNER OR POSSESSOR MAY
5 USE TO DEFEND THEIR PROPERTY OR EJECT A TRESPA-
6 SSER.....

7 A. CONTRARY TO THE TRIAL COURT'S INSTRUCTIONS, A
8 DEFENDANT'S RIGHT TO EJECT A TRESPASSER IS NOT
9 NECESSARILY LIMITED TO THAT NECESSARY TO THE
10 FORCE NECESSARY TO PREVENT PROPERTY DAMAGE
11 OR PHYSICAL INJURY....

12 B. THE TRIAL COURT'S MISSTATEMENT OF THE LAW
13 AND MISINSTRUCTION OF THE JURY MATERIALLY
14 PREJUDICED PETITIONER, AND REQUIRES REVERSAL
15 OF PETITIONER'S CONVICTION.

17 II. THIS COURT SHOULD GRANT REVIEW AND REVERSE
18 PETITIONER'S CONVICTION, BECAUSE THE TRIAL COURT
19 ALSO MISINSTRUCTED THE JURY THAT A PROPERTY
20 OWNERS' RIGHT TO DEFEND THE PROPERTY IS
21 DETERMINED AND LIMITED BY THE INTENT OF
22 THE TRESPASSER IN ENTERING THE PROPERTY....

24 III. TO THE EXTENT THAT THE TRIAL COURT FAILED
25 TO INSTRUCT THE JURY SUA SPONTE
26 AS TO THE BURDEN OF PROOF PETITIONER'S RIGHT
27 TO DEFEND THE PROPERTY, THIS COURT SHOULD GRANT
28 REVIEW TO DETERMINE WHETHER THE FAILURE TO

1 REQUEST SUCH AN INSTRUCTION CONSTITUTES
2 INEFFECTIVE ASSISTANCE OF COUNSEL

3
4 IV. THIS COURT SHOULD GRANT REVIEW, AND REVERSE
5 PETITIONER'S CONVICTION, BECAUSE THE TRIAL COURT
6 ERRED IN INSTRUCTING THE JURY REGARDING THE
7 UNAVAILABILITY OF SELF DEFENSE FOR A PERSON
8 THAT INITIATES A QUARREL, BECAUSE IT WAS
9 NICHOLS, RATHER THAN PETITIONER, THAT INITIATED
10 THE QUARREL

11
12 V. THIS COURT SHOULD REVERSE PETITIONER'S CONVICTION,
13 BECAUSE THE TRIAL COURT IMPROPERLY ADMITTED
14 EVIDENCE OF PETITIONER'S PRIOR MISDEMEANOR BATTERY
15 CONVICTION BASED MERELY ON THE FACT OF THAT
16 CONVICTION, WITHOUT CONSIDERING THE UNDERLYING
17 FACTS AND THEIR SIMILARITY OR DISSIMILARITY
18 TO THE PRESENT ALLEGED OFFENSE, AND THEREBY
19 VIOLATED PETITIONER'S DUE PROCESS RIGHTS
20 UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

21 A. BY REQUIRING A WEIGHING OF THE PROBATIVE
22 VALUE OF EVIDENCE REGARDING DOMESTIC VIOLENCE
23 AGAINST ITS PREJUDICIAL EFFECTS, THE STATUTE
24 AND DUE PROCESS REQUIRE A SHOWING OF THE
25 FACTS SURROUNDING THE PRIOR CONVICTIONS, AND
26 NOT MERELY THE FACT OF SUCH CONVICTION

27 B. THE TRIAL COURT'S ADMISSION OF THE MERE FACT
28 OF APPELLANT'S PRIOR CONVICTION, UNACCOMPAN-

1 - LED BY ANY ANALYSIS OF THE FACTS SURROUND-
2 ING THAT CONVICTION, VIOLATED SECTION 1109 AS
3 WELL AS APPELLANT'S FEDERAL RIGHT TO DUE
4 PROCESS UNDER THE FIFTH AND FOURTEENTH
5 AMENDMENTS, AND REQUIRES REVERSAL OF APPELLANT'S
6 CONVICTION

7
8 VI. THE TRUE FINDINGS ON THE STRIKE PRIORS MUST
9 BE REVERSED UNDER THE DUE PROCESS CLAUSE
10 OF THE FIFTH AND FOURTEENTH AMENDMENTS,
11 BECAUSE THE FINDINGS ARE NOT SUPPORTED BY
12 SUBSTANTIAL EVIDENCE

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"ATTACHMENTS" (8-12) PGS.

SUPERIOR COURT OF CALIFORNIA, STATE OF CALIFORNIA
191 N. First Street
San Jose, CA 95113-1090

TO: Gabriel Hernandez
F-16381 6300 West Cecil Ave./P.O. Box 6000
Delano, CA 93216

RE: G. Hernandez vs Santa Clara County "et Al"
Case Nbr: 1-07-CV-082804

NOTICE OF CASE MANAGEMENT CONFERENCE

A Case Management Conference has been scheduled for the above entitled case and all parties are directed to appear in this court on:

Date: 08/07/07 At: 0215PM in: Dept 16

Superior Court, 191 North First St., San Jose, CA 95113

1. You must file and serve a completed 'Case Management Conference Questionnaire' and 'At-issue Memorandum' at least five (5) calendar days prior to the above scheduled conference.
2. Counsel for each party and each self-represented party shall attend the conference and be fully prepared to participate effectively.
3. Compliance with all Local Rules of Court is required.

For further information, contact the Calendar Office at (408) 882-2100.

Parties/Attorneys of Record:

CC:

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's Office at (408) 882-2700, or use the Court's TDD line, (408) 882-2690 or the Voice/TDD California Relay Service, (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 4/03/07. KIRI TORRE, Chief Executive Officer by Brian Faraone, Deputy

#9
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

TO: Gabriel Hernandez
F-16381 6300 West Cecil Ave./P.O. Box 6000
Delano, CA 93216

RE: G. Hernandez vs Santa Clara County "et Al"
Case Nbr: 1-07-CV-082804

PROOF OF SERVICE

ORDER: CASE IS DEEMED NOT COMPLEX
(SIGNED BY JUDGE JACK KOMAR),

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC:

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 04/02/07. KIRI TORRE, Chief Executive Officer/Clerk by Rowena Walker, Deputy

"ATTACHMENTS" (8-12) PGS.

#10
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

ENDORSED

2007 APR 24 A 11:29

KIRI TORRE, CLERK OF THE SUPERIOR COURT
COUNTY OF SANTA CLARA, CALIFORNIA
BY: Trang Vu
DEPUTY CLERK

TO: Gabriel Hernandez
F-16381 6300 West Cecil Ave./P.O. Box 6000
Delano, CA 93216

RE: G. Hernandez vs Santa Clara County "et Al"
Case Nbr: 1-07-CV-082804

PROOF OF SERVICE

ORDER FROM JUDGMENT MCKENNEY VOIDING COMPLAINT AND DISMISSING ACTION

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC:

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 04/24/07. KIRI TORRE, Chief Executive Officer/Clerk by Trang Vu, Deputy

#11

UCS

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA Mailing Address: 191 North First Street, San Jose, CA 95113 Unless otherwise noted.		FOR COURT USE ONLY FILED 2007 APR 24 A 11:20 Trang Vu
<input checked="" type="checkbox"/> DOWNTOWN COURTHOUSE <input type="checkbox"/> LOS GATOS COURTHOUSE <input type="checkbox"/> SOUTH COUNTY COURTHOUSE - 12425 Monterey Road, San Martin, CA 95046 <input type="checkbox"/> PALO ALTO COURTHOUSE - 270 Grant Avenue, Palo Alto, CA 94306 <input type="checkbox"/> TRAFFIC COURT <input type="checkbox"/> HALL OF JUSTICE COURTHOUSE <input type="checkbox"/> TERRAINE COURTHOUSE <input type="checkbox"/> JUVENILE DELINQUENCY		
Plaintiff/Petitioner: Gabriel Hernandez		
Defendant/Respondent: County of Santa Clara "et al"		
REQUEST FOR ACTION		CASE NUMBER: 107CV082804

Date: April 19, 2007

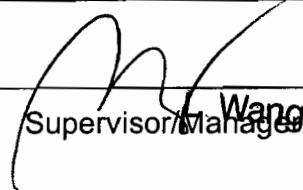
To Judge: Kevin McKenney

For your review and instruction
 For your information
 Other: Plaintiff's fee waiver was denied on 04/03/2007. Ten days have passed and no payment has been made. Please void the complaint filed on 03/29/2007, vacate cmc hearing on 08/07/2007 and dismiss entire case for non-payment of filing fee.

Trang Vu

tu

Legal Process Clerk


 Wang
 Supervisor/Manager Approval
Order of Court File Stamp Schedule Hearing Place in File – No Action Required Order(s) as Follows:*OK to void complaint and dismiss.*

Dated: 4-20-07


 Judge of the Superior Court
 KEVIN E. MCKENNEY
REQUEST FOR ACTION

"ATTACHMENTS" (13-26) PG'S.

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FILED

APR 2 2007

RICHARD W. WILKINS
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA7
8 GABRIEL HERNANDEZ, No. C 06-6977 SI (pr)

9 Plaintiff,

10 v. **ORDER OF DISMISSAL WITH
11 SANTA CLARA COUNTY LEAVE TO AMEND**

12 SHERIFF'S DEPT.; et al.,

13 Defendants.
1415 **INTRODUCTION**16 Gabriel Hernandez, formerly an inmate at the Santa Clara County Jail and now an inmate
17 at the Kern Valley State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. His
18 complaint is now before the court for review pursuant to 28 U.S.C. § 1915A. His motion for
19 appointment of counsel and motion to order the defendants to reply also are before the court for
20 consideration.21
22 **BACKGROUND**23 The complaint concerns events that occurred while Hernandez was housed at the Santa
24 Clara County Jail. The complaint alleges the following:25 On January 20, 2005, Hernandez was transported from the Elmwood facility to the Santa
26 Clara County main jail. When he arrived, he was put in a holding cell for protective custody
27 inmates. Shortly thereafter he "was picked, targeted and viciously attacked" by "an inmate (John
28 Doe/attacker/rival enemy/sereneoe/active gang member)." Complaint, p. 2. Hernandez

1 sustained unidentified "serious painful injuries." Id. Correctional officers entered the cell and
2 removed the attacking inmate. Hernandez complained frequently and to many people (including
3 his public defender and other people at the courthouse when he was taken there) over the course
4 of the day that he needed medical attention. Despite his repeated demands for immediate care,
5 he did not receive medical attention until the next day. The medical attention that was provided
6 the day after the attack consisted of Motrin and ice packs from a nurse who examined him. Id.
7 at 10.

8 Later on the day of the attack, he was removed from his cell to be shackled and returned
9 to the Elmwood facility. A correctional officer brought by him the shackled inmate who earlier
10 had attacked him and they came within 4-5 feet of each other. Hernandez moved away and
11 nothing happened.

12 Hernandez was harassed by a correctional officer on July 22, 2005.

13 Hernandez was subjected to an "assault and battery" by correctional officer Taylor at the
14 Elmwood facility on December 11, 2005. Id. at 11.

15 Hernandez was "punished falsely and placed inside a single cell from December 11, 2005
16 through December 26, 2005." Id. at 11. He was treated with cruel and unusual punishment
17 during that time.

19 DISCUSSION

20 A. Standards

21 A federal court must engage in a preliminary screening of any case in which a prisoner
22 seeks redress from a governmental entity or officer or employee of a governmental entity. See
23 28 U.S.C. §1915A(a). The court must identify any cognizable claims, and dismiss any claims
24 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
25 monetary relief from a defendant who is immune from such relief. See 28 U.S.C.
26 §1915A(b)(1),(2). A claim that is incomprehensible may be dismissed as frivolous as it is
27 without an arguable basis in law. See *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989).

28 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that

1 a right secured by the Constitution or laws of the United States was violated, and (2) that the
2 violation was committed by a person acting under the color of state law. See West v. Atkins,
3 487 U.S. 42, 48 (1988).

4

5 B. Analysis Of Complaint

6 The complaint has several problems and must be amended.

7 First, Hernandez did not allege whether he was a pretrial detainee or was a convict at the
8 time of the incidents alleged in his complaint. His status matters because it affects the
9 constitutional provision under which his claims arise: a pretrial detainee's claims about
10 conditions of confinement arise under the Fourteenth Amendment's Due Process Clause, while
11 a convict's claims arise under the Eighth Amendment's Cruel and Unusual Punishment Clause.
12 Even though pretrial detainees' claims arise under the Due Process Clause, the Eighth
13 Amendment serves as a benchmark for evaluating those claims. See Carnell v. Grimm, 74 F.3d
14 977, 979 (9th Cir. 1996) (8th Amendment guarantees provide minimum standard of care for
15 pretrial detainees). The appropriate standard for evaluating constitutional claims brought by
16 pretrial detainees is the same one used to evaluate prisoners' claims under the Eighth
17 Amendment. "The requirement of conduct that amounts to 'deliberate indifference' provides an
18 appropriate balance of the pretrial detainees' right to not be punished with the deference given
19 to prison officials to manage the prisons." Redman v. County of San Diego, 942 F.2d 1435,
20 1443 (9th Cir. 1991) (en banc) (citation omitted), cert. denied, 502 U.S. 1074 (1992). See, e.g.,
21 Carnell, 74 F.3d at 979 (standard of deliberate indifference applicable to pretrial detainees'
22 medical claims); Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.) (placement of
23 pretrial detainees in safety cells actionable under Due Process Clause only if prison officials act
24 with deliberate indifference), cert. denied, 516 U.S. 916 (1995). In his amended complaint,
25 Hernandez should identify his status at the relevant times.

26 Second, Hernandez apparently wants to hold jail officials liable for the beating he
27 received from another inmate but his complaint has no allegations indicating a basis to hold them
28 liable. Jailers are not absolute guarantors of inmate safety; the Constitution requires that they

1 not act with deliberate indifference to a known risk of harm. For example, prison officials have
2 a duty to protect prisoners from violence at the hands of other prisoners. See Farmer v. Brennan,
3 511 U.S. 825, 833 (1994); Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982); Gillespie v.
4 Civiletti, 629 F.2d 637, 642 & n.3 (9th Cir. 1980). A prisoner may state a § 1983 claim against
5 prison officials only where the officials acted with "deliberate indifference" to the threat of
6 serious harm or injury to a prisoner by another prisoner, see Berg v. Kincheloe, 794 F.2d 457,
7 459 (9th Cir. 1986). A prison official is deliberately indifferent if he knows that a prisoner faces
8 a substantial risk of serious harm and disregards that risk by failing to take reasonable measures
9 to abate it. See Farmer, 511 U.S. at 837, 844. In his amended complaint, Hernandez may
10 attempt to allege that jail officials knew of a risk of attack by the unknown inmate and acted with
11 deliberate indifference to it.

12 Third, Hernandez appears to be dissatisfied with the response to his request for medical
13 care but his complaint does not state a constitutional claim concerning that response. The
14 complaint does not identify the injuries sustained and states that the treatment provided for the
15 unidentified injuries the day after the attack consisted of Motrin and an ice pack. If that was all
16 the care that was needed, it would not appear that the injuries were of an emergency nature such
17 that same-day care was medically necessary. A one-day delay in medical care would not rise to
18 the level of deliberate indifference to serious medical needs. To state a claim, the prisoner must
19 show (1) a serious medical need and (2) deliberate indifference to that need by prison officials.
20 See McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other grounds,
21 WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). In his
22 amended complaint, Hernandez may attempt to allege that jail officials knew of a serious
23 medical need and acted with deliberate indifference to it.

24 Fourth, the allegations that Hernandez was subjected to verbal harassment do not show
25 a constitutional violation. Allegations of verbal harassment and abuse fail to state a claim
26 cognizable under 42 U.S.C. § 1983. See Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997);
27 Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1353 (9th Cir. 1981), aff'd sub nom. Kush
28 v. Rutledge, 460 U.S. 719 (1983); see, e.g., Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996),

1 amended 135 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments by prison guard
2 not enough to implicate 8th Amendment); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir.
3 1987) (directing vulgar language at prisoner does not state constitutional claim); Burton v.
4 Livingston, 791 F.2d 97, 99 (8th Cir. 1986) ("mere words, without more, do not invade a
5 federally protected right"). The harassment claim is dismissed..

6 Fifth, Hernandez's allegation that he was subjected to an "assault and battery" by
7 correctional officer Taylor is conclusory and must be amended if he wants to attempt to state a
8 claim under § 1983. In evaluating an excessive force claim from a pretrial detainee, the same
9 standard apparently applies as for a claim from a prisoner. "[T]he core judicial inquiry is . . .
10 whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously
11 and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); see also id. at 7
12 (court may evaluate the need for application of force, the relationship between that need and the
13 amount of force used, the extent of any injury inflicted, the threat reasonably perceived by the
14 responsible officials, and any efforts made to temper the severity of a forceful response). The
15 "assault and battery" allegation is so devoid of detail that the court cannot determine whether it
16 states a § 1983 claim for excessive force. Hernandez may attempt to cure this in his amended
17 complaint.

18 Sixth, Hernandez states that he was put in a single cell for 15 days as punishment.
19 Liberally construed, that claim is cognizable as a due process violation. See Bell v. Wolfish, 441
20 U.S. 520, 535-37 (1979). However, his further allegation that he was treated by other
21 correctional officer with "cruel, unjust punishment" while on single-cell status is too conclusory
22 to state a § 1983 claim for relief against those persons, even if he could identify them.

23 Seventh, one page of Hernandez's form complaint has a listing of several claims that have
24 no connection to the rest of the complaint, e.g., claim for breach of contract, claim for "prisoner
25 forced to participate in biomedical or behavioral research," and interference with right to obtain
26 judicial review of legality of confinement. Complaint, p. 3. If Hernandez wants to pursue any
27 of those claims, he must allege them in much greater detail and link defendants to such claims
28 in his amended complaint.

#18

1 Eighth, Hernandez has referred to several persons as John Doe defendants. It is
2 permissible to use Doe defendant designations to refer to defendants whose names are unknown
3 to plaintiff in the complaint and any amended complaint.¹ Although the use of Doe defendants
4 is acceptable to withstand dismissal of a complaint at the initial review stage, using Doe
5 defendants creates its own problem: those persons cannot be served with process in this action
6 until they are identified by their real names. The court will not stall this action while plaintiff
7 tries to learn the name of the Doe defendant. Rather, plaintiff must promptly take steps to
8 discover the name of the unnamed defendant and provide that information to the court in an
9 amendment to his pleading. The burden remains on the plaintiff; the court will not undertake
10 to investigate the names and identities of unnamed defendants. If plaintiff has not provided a
11 true name and address for service on any John Doe defendant by **July 6, 2007**, the defendant will
12 be dismissed from the action without prejudice to plaintiff filing a separate action against him
13 if he ever learns his true identity and finds him.

14 Hernandez must file an amended complaint that sets forth "a short and plain statement
15 of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). For each
16 instance of a constitutional violation, he should name each person who violated his constitutional
17 right(s), describe what each person did to violate his right(s), state where the violation occurred,
18 and when the violation occurred.

19

20 C. Pending Motions

21 Hernandez has filed a motion for appointment of counsel. A district court has discretion
22 under 28 U.S.C. § 1915(e)(1) to designate counsel to represent an indigent civil litigant in
23 exceptional circumstances. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).
24 This requires evaluation of both the likelihood of success on the merits and the ability of the
25 plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. See

26

27 ¹If a plaintiff alleges that multiple unknown people violated his constitutional rights, each
28 unknown person must be identified as a separate John Doe, e.g., John Doe #1, John Doe #2, etc.
so that eventually each John Doe defendant can be replaced by a separate person when his or her
true name becomes known.

1 id. Neither of these factor is dispositive and both must be viewed together before deciding on
2 a request for counsel under section 1915(e)(1). Having considered both of these factors, the
3 court concludes that exceptional circumstances requiring the appointment of counsel are not
4 evident. The motion for appointment of counsel is DENIED. (Docket # 4.)

5 Hernandez filed a "motion for an order of the defendants to reply." The court does not
6 order the defendants to file an answer or motion unless and until the court has done an initial
7 review under 28 U.S.C. § 1915A and determines the plaintiff's pleading warrants a response.
8 Here, the court's § 1915A review resulted in the determination (expressed in this order) that
9 plaintiff needs to file an amended complaint, so the court will not consider ordering defendants
10 to file an answer or motion until the court reviews the amended complaint under § 1915A.
11 Accordingly, the motion for an order compelling defendants to reply is DENIED. (Docket # 5.)

CONCLUSION

14 The complaint is DISMISSED with leave to amend. The amended complaint must be
15 filed no later than **May 11, 2007**. The amended complaint must include the caption and civil
16 case number used in this Order and the words AMENDED COMPLAINT on the first page.
17 Plaintiff is cautioned that his amended complaint must be a complete statement of his claims and
18 will supersede existing pleadings. See London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th
19 Cir. 1981) ("a plaintiff waives all causes of action alleged in the original complaint which are
20 not alleged in the amended complaint.") Failure to timely file the amended complaint will result
21 in the defective claims.

22 The motions for an order requiring defendants to reply and for appointment of counsel
23 are DENIED. (Docket # 4 and # 5.)

24 IT IS SO ORDERED.

Dated: March 2, 2007


SUSAN ILLSTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GABRIEL HERNANDEZ,

Case Number: CV06-06977 SI

Plaintiff,

CERTIFICATE OF SERVICE

v.

SANTA CLARA COUNTY et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 3, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gabriel Hernandez F-16381
Kern Valley State Prison
C5-125
P.O. Box 5103
Delano, CA 93216-5103

Dated: April 3, 2007

Richard W. Wiegking, Clerk
By: Tracy Sutton, Deputy Clerk



"ATTACHMENTS" (13-26) PGS.

RECEIVED

JUL 11 2008

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GABRIEL HERNANDEZ,
Plaintiff,

No. C 06-6977 SI (pr)

ORDER OF SERVICE

v.

SANTA CLARA COUNTY
SHERIFF'S DEPT.; et al.,
Defendants.

Gabriel Hernandez, currently an inmate at the Kern Valley State Prison, filed a pro se civil rights action under 42 U.S.C. § 1983 concerning acts and omissions that occurred at the Santa Clara County Jail when he was housed there in 2005. Upon initial review, the court dismissed the complaint with leave to amend, giving specific guidance as to the deficiencies that needed to be cured. Order of Dismissal With Leave To Amend, pp. 3-6. Hernandez did not file an amended complaint by the deadline. After waiting several more months and receiving nothing from Hernandez, the court then dismissed all the claims in the complaint except a due process claim. Order Of Partial Dismissal And For Amendment, p. 1. As to the due process claim, the court explained that Hernandez had to file an amendment to complaint to inform the court whether he was a convict or pretrial detainee, as his status made a difference as to whether the complaint stated a claim for a due process violation. Id at 2.

Hernandez then filed a declaration, a motion for leave to file an amended complaint, and an amendment to complaint on January 14, 2008. He explained therein that he was a pretrial detainee at the time of the acts and omissions alleged in the complaint. In his motion for leave

1 to file an amended complaint, Hernandez stated that he was prevented by prison staff at Kern
2 Valley from timely filing the amended complaint and that the staff at Kern Valley was harassing
3 him. It is unclear to the court whether the motion for leave to file an amended complaint
4 pertained to the amendment that he filed with the motion, or was a request to further amend. The
5 motion for leave to amend was unnecessary insofar as it requested permission to file the
6 amendment to the complaint because the court already had ordered Hernandez to file that
7 amendment. If, on the other hand, Hernandez meant that he wanted to further amend, his motion
8 was deficient because a proposed amended complaint was not submitted with the motion or in
9 the six months since the motion was filed.¹ Federal Rule of Civil Procedure 15(a) provides that
10 leave to amend "shall be freely given when justice so requires" but the court cannot make that
11 determination without seeing the proposed new pleading. See Lake v. Arnold, 232 F.3d 360,
12 374 (3d Cir. 2000) ("Obviously, without this draft complaint, the District Court cannot evaluate
13 the merits of a plaintiff's request . . . [T]he court had nothing upon which to exercise its
14 discretion.") The motion for leave to amend is DENIED without prejudice.

15 As of now, the operative pleading is the complaint, as amended by the amendment to the
16 complaint. Hernandez has stated a claim for a due process violation based on his placement in
17 a single cell for 15 days as punishment when he was a pretrial detainee at the Elmwood facility
18 of the Santa Clara County jail. Hernandez alleged that he was put in a single cell from
19 December 11, 2005 through December 25, 2005 as punishment by Santa Clara County correction
20 officers Taylor and Hendericks. Complaint, p. 11; see Bell v. Wolfish, 441 U.S. 520, 535-37
21 (1979). Service of process will be ordered on these two defendants.

22

23

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25 ¹If Hernandez wants to pursue claims about events at Kern Valley State Prison, he may
26 file a complaint in the proper venue (i.e., the U.S. District Court for the Eastern District of
27 California) after he exhausts administrative remedies. Such claims would not be proper in this
28 action because they would not satisfy the permissive joinder requirements of Federal Rule of
Civil Procedure 20. Hernandez also should bear in mind that, to establish a claim for any
violation of the right of access to the courts, the prisoner-plaintiff must show that he suffered an
actual injury as discussed in Lewis v. Casey, 518 U.S. 343, 350-51 (1996).

1 For the foregoing reasons,

2 1. The complaint states a claim for relief under 42 U.S.C. § 1983 against defendants
3 Taylor and Hendericks for a due process violation. All other claims and defendants are
4 dismissed.

5 2. The clerk shall issue summonses and the United States Marshal shall serve,
6 without prepayment of fees, the summons, a copy of the complaint and a copy of all the
7 documents in the case file upon defendants, all of whom allegedly are employed by the Santa
8 Clara County Department of Corrections and work at the Elmwood facility: (1) correction officer
9 Taylor and (2) correction officer Hendericks.

10 3. In order to expedite the resolution of this case, the following briefing schedule for
11 dispositive motions is set:

12 a. No later than **September 12, 2008**, defendants must file and serve a motion
13 for summary judgment or other dispositive motion. If defendants are of the opinion that this
14 case cannot be resolved by summary judgment, they must so inform the court prior to the date
15 the motion is due.

16 b. Plaintiff's opposition to the summary judgment or other dispositive motion
17 must be filed with the court and served upon defendants no later than **October 24, 2008**.
18 Plaintiff must bear in mind the following notice and warning regarding summary judgment as
19 he prepares his opposition to any summary judgment motion:

20 The defendants may make a motion for summary judgment by which they
21 seek to have your case dismissed. A motion for summary judgment under Rule
22 56 of the Federal Rules of Civil Procedure will, if granted, end your case. [¶]
23 Rule 56 tells you what you must do in order to oppose a motion for summary
24 judgment. Generally, summary judgment must be granted when there is no
25 genuine issue of material fact -- that is, if there is no real dispute about any fact
26 that would affect the result of your case, the party who asked for summary
27 judgment is entitled to judgment as a matter of law, which will end your case.
28 When a party you are suing makes a motion for summary judgment that is
properly supported by declarations (or other sworn testimony), you cannot simply
rely on what your complaint says. Instead, you must set out specific facts in
declarations, depositions, answers to interrogatories, or authenticated documents,
as provided in Rule 56(e), that contradict the facts shown in the defendants'
declarations and documents and show that there is a genuine issue of material fact
for trial. If you do not submit your own evidence in opposition, summary
judgment, if appropriate, may be entered against you. If summary judgment is
granted, your case will be dismissed and there will be no trial. (See Rand v.

#24

1 Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998).

2 c. If defendants wish to file a reply brief, the reply brief must be filed and
3 served no later than **November 7, 2008**.

4 4. All communications by plaintiff with the court must be served on a defendant's
5 counsel by mailing a true copy of the document to defendant's counsel. The court may disregard
6 any document which a party files but fails to send a copy of to his opponent. Until a defendant's
7 counsel has been designated, plaintiff may mail a true copy of the document directly to
8 defendant, but once a defendant is represented by counsel, all documents must be mailed to
9 counsel rather than directly to that defendant.

10 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
11 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is
12 required before the parties may conduct discovery.

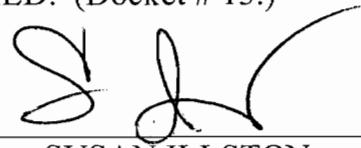
13 6. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the
14 court informed of any change of address and must comply with the court's orders in a timely
15 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
16 pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of
17 address in every pending case every time he is moved to a new facility.

18 7. Plaintiff is cautioned that he must include the case name and case number for this
19 case on any document he submits to this court for consideration in this case.

20 8. Plaintiff's motion to amend is DENIED. (Docket # 13.)

21 IT IS SO ORDERED.

22 Dated: July 1, 2008



SUSAN ILLSTON
United States District Judge

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27

28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GABRIEL HERNANDEZ,

Case Number: CV06-06977 SI

Plaintiff,

CERTIFICATE OF SERVICE

v.

SANTA CLARA COUNTY et al,

Defendant.

/

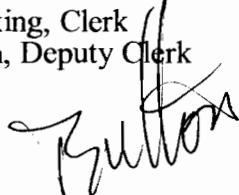
I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 2, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gabriel Hernandez F-16381
Kern Valley State Prison
C5-125
P.O. Box 5103
Delano, CA 93216-5103

Dated: July 2, 2008

Richard W. Wiking, Clerk
By: Tracy Sutton, Deputy Clerk



#26

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GABRIEL HERNANDEZ,

Plaintiff,

Case Number: CV06-06977 SI

CERTIFICATE OF SERVICE

v.

SANTA CLARA COUNTY et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 2, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gabriel Hernandez F-16381
Kern Valley State Prison
C5-125
P.O. Box 5103
Delano, CA 93216-5103

Dated: July 2, 2008

Richard W. Wiking, Clerk
By: Tracy Sutton, Deputy Clerk

Received 7.14.08



RECEIVED

Gabriel Hernandez
Jcl-231 K-5 P
P.O. Box - 5103
Delano, CA 93216

Kern Valley State Prison
Facility C, Building 1

AUG 25 2008

RICHARD W. WEICKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
RECEIVED

TO: Court Clerk Office

450 Golden Gate Ave. 16th fl.
San Francisco, CA 94102

Kern Valley State Prison
Facility C, Building 1



RECEIVED

AUG 25 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

To: Court Clerk Office
450 Golden Gate Ave. 16th Floor
San Francisco, CA 94102

The Prison

8-18-08

CONFIDENTIAL
EYES ONLY

AUGUST 18, 2008

CLERK OF THE COURT

UNITED STATES DISTRICT
COURT NORTHERN DISTRICT
OF CALIFORNIA

450 Golden Gate Ave. 16th Floor
San Francisco, Ca 94102

E-filing

SI

Re: PETITION FOR WRIT OF
HABEAS CORPUS

PR

CV 08

4085

Dear Clerk:

I am incarcerated and do not have an attorney to assist me with this paperwork. I am asking for your assistance with these documents.

As of this very day I, am unable to provide the month of 7.0.08, trust account Receipt, to complete the "PRISONER'S APPLICATION TO PROCEED IN FORMA PAUPERIS" Form. But I will forward immediately, upon obtaining the receipt.

ENCLOSURE PLEASE FIND:

- (1) One Original copy of, Petition for writ of habeas Corpus, and "Prisoner's application to proceed in forma pauperis".

Please file and return a receipt of received documents.
THANK YOU FOR YOUR ATTENTION TO THIS MATTER.

Sincerely,

GABRIEL HERNANDEZ, F16381 C-1-231 HVSP, P.O. Box 5103, DELANO, CA 93216